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Nos. 82-1005, 82-1247, 82-1591

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHEVRON U.S.A., INC.,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents;

AMERICAN IRON AND STEEL INSTITUTE, *et al.*,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents;

ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITIONS

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April 29, 1983

QUESTION PRESENTED

Whether the court of appeals, ruling on provisions of the Clean Air Act for meeting the health-based National Ambient Air Quality Standards where they are now violated, correctly held that the Administrator of the Environmental Protection Agency exceeded her authority when she redefined the term "source" to mean whole industrial plants only and thereby exempted from permit requirements the major industrial installations (such as boilers and blast furnaces) built within such plants.

PARTIES TO THE PROCEEDING

The respondents are Natural Resources Defense Council, Inc., Citizens for a Better Environment, Inc., and American Lung Association of Northwestern Ohio, Inc. NRDC and CBE are national non-profit organizations with more than 43,000 and 24,000 members, respectively. The Association (formerly known as the Northwestern Ohio Lung Association) is a non-profit organization serving metropolitan Toledo, Ohio, and has more than 68,000 contributor/members. Other parties are identified by the petitions for certiorari.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	i
OPINION BELOW	1
STATUTES AND REGULATIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITIONS	5
I. THE LOWER COURT DECISION CREATES NO CONFLICT AMONG CASES, RAISES NO CONSTITUTIONAL ISSUES, AND PRESENTS NO GENERALLY APPLICABLE QUESTIONS OF STATUTORY CONSTRUCTION OR ADMINISTRATIVE LAW	5
A. No Conflict Among Cases	5
1. Among the Circuits	5
2. With Supreme Court Decisions	6
3. Within the D.C. Circuit	7
B. No Constitutional Issue	8
C. No Generally Applicable Questions of Rules for Statutory Construction or Principles of Administrative Law	8
II. THE LOWER COURT DECISION WAS CORRECT	10
A. The 1977 "Nonattainment" Amendments	11
B. Analysis of the Statutory Terms	15
C. Analysis of the Legislative History	16
1. The 1976 Bill	17
2. The 1976 EPA Interpretive Ruling	19
3. The 1977 Amendments	20
D. Analysis of the Statutory Purpose	22
III. CONGRESS SHOWS EVERY SIGN OF ENDORSING THE LOWER COURT DECISION	23
IV. FURTHER REVIEW WOULD UNNECESSARILY DELAY PUBLIC PROTECTION FROM RECOGNIZED HEALTH HAZARDS	24
V. THE LOWER COURT DECISION CORRECTS AN ABUSE OF THE "BUBBLE" CONCEPT	26
CONCLUSION	28

TABLE OF AUTHORITIES

	Pages
CASES:	
Alabama Power Co. v. *Costle*, 636 F.2d 323 (D.C. Cir. 1979)	7,8,14
ASARCO v. *EPA*, 578 F.2d 319 (D.C. Cir. 1978)	6,7
Big Rivers Electric Corp. v. *EPA*, 523 F.2d 16 (6th Cir. 1975), *cert. denied*, 425 U.S. 934 (1975)	7
Kennecott Copper Corp. v. *EPA*, 526 F.2d 1149 (9th Cir. 1975), *cert. denied*, 425 U.S. 935 (1975)	7
Natural Resources Defense Council v. *EPA*, 489 F.2d 390 (5th Cir. 1974), *rev'd in part on other grounds sub nom. Train* v. *NRDC*, 421 U.S. 60 (1975)	7
National Labor Relations Board v. *Brown*, 380 U.S. 278 (1965)	9
Natural Resources Defense Council v. *Gorsuch*, 685 F.2d 718 (D.C. Cir. 1982)	1,5,8, 22,23
Potomac Electric Power Co. v. *EPA*, 650 F.2d 509 (4th Cir. 1981)	6
Securities and Exchange Commission v. *Chenery Corp.*, 332 U.S. 194 (1947)	10
Sierra Pacific Power Co. v. *EPA*, 647 F.2d 60 (9th Cir. 1981)	6
Train v. *Natural Resources Defense Council*, 421 U.S. 60 (1975)	6,7
Union Electric Co. v. *EPA*, 427 U.S. 246 (1976)	6
Wisniewski v. *United States*, 353 U.S. 901 (1957)	8
STATUTES:	
Clean Air Act (1970 provisions, amended 1977)	
Section 110(a)(2)(A), 84 Stat. 1680 (1970)	11
Section 110(e), 84 Stat. 1682 (1970)	11
Clean Air Act (as amended 1977)	
Section 108, 42 U.S.C. § 7498	2
Section 109, 42 U.S.C. § 7409	2
Section 110(a)(2), 42 U.S.C. § 7410(a)(2)	6,7

	Pages
Section 110(a)(2)(D), 42 U.S.C. § 7410(a)(2)(D)	2,3,7, 9,11,12
Section 110(a)(2)(H)(ii), 42 U.S.C. § 7410(a)(2)(H)(ii)	25
Section 110(a)(2)(I), 42 U.S.C. § 7410(a)(2)(I)	14,25
Section 110(c)(1)(C), 42 U.S.C. § 7410(c)(1)(C)	25
Section 111, 42 U.S.C. § 7411	7,13
Section 111(a)(3), 42 U.S.C. § 7411(a)(3)	14,15
Section 111(a)(4), 42 U.S.C. § 7411(a)(4)	14
Section 129(a), codified as a note to 42 U.S.C. § 7502	16,21
Sections 160-169A, 42 U.S.C. §§ 7460-91	7
Sections 171-178, 42 U.S.C. §§ 7501-08	11
Section 171(1), 42 U.S.C. § 7501(1)	13
Section 171(3), 42 U.S.C. § 7501(3)	13
Section 171(4), 42 U.S.C. § 7501(4)	14
Section 172(a), 42 U.S.C. § 7502(a)	11
Section 172(b)(3), 42 U.S.C. § 7502(b)(3)	12
Section 172(b)(5), 42 U.S.C. § 7502(b)(5)	13
Section 172(b)(6), 42 U.S.C. § 7502(b)(6)	2,3,7, 9,11,12
Section 173, 42 U.S.C. § 7503	2,3,7, 9,11,12, 14,15,16, 17,20,21, 26
Section 173(1)(A), 42 U.S.C. § 7503(1)(A)	12,13
Section 173(1)(B), 42 U.S.C. § 7503(1)(B)	12,13, 15,16
Section 173(2), 42 U.S.C. § 7503(2)	12,13
Section 173(3), 42 U.S.C. § 7503(3)	13
Section 173(4), 42 U.S.C. § 7503(4)	14,24
Section 302(j), 42 U.S.C. § 7602(j)	14
Section 307(b)(1), 42 U.S.C. § 7607(b)(1)	6
Section 323, 42 U.S.C. § 7623	11
Steel Industry Compliance Extension Act of 1981, Pub. L. No. 97-23, 95 Stat. 191 (1981)	9,23

	Pages
LEGISLATIVE HISTORY:	
S. Rep. No. 127, 91st Cong., 2d Sess. (1970)	6
S. Rep. No. 717, 94th Cong., 2d Sess. (1976)	17
H.R. Rep. No. 294, 95th Cong., 1st Sess. (1977)	13,16,22
H.R. Rep. No. 121, 97th Cong., 1st Sess. (1981)	23
S. Rep. No. 666. 97th Cong., 2d Sess. (1982)	24
A Legislative History of the Clean Air Act Amendments of 1970 (Sen. Comm. on Public Works, Ser. No. 93-18, 1974)	6
A Legislative History of the Clean Air Act Amendments of 1977 (Sen. Comm. on Environment and Public Works, Ser. No. 95-16, 1978)	13,16,17, 18,20,21
128 Cong. Rec. S15250 (daily ed. Dec. 16, 1982)	26
129 Cong. Rec. S2583 (daily ed. Mar. 10, 1983)	24
ADMINISTRATIVE MATERIALS:	
Federal Register Notices	
41 Fed. Reg. 55,524 (1976)	19
45 Fed. Reg. 52,676 (1980)	3
46 Fed. Reg. 50,766 (1981)	3
48 Fed. Reg. 4972 (1983)	25
REGULATIONS:	
40 C.F.R. § 51.18(j)(1)	1,3,4
40 C.F.R. § 52.24(f)	3,4
MISCELLANEOUS:	
Congressional Research Service, "The Application of Nonattainment Area Sanctions Under the Clean Air Act" (Feb. 17, 1983)	26
Declaration of Jeff Gabe, Research Director, Citizens for a Better Environment (San Francisco) (Jan. 1982) (on file with the court of appeals)	4
EPA, "Emissions Offset, Banking, and Trading Update" (Feb. 1980)	4
New York Times, Aug. 18, 1982	24
Report of the National Commission on Air Quality (Preliminary Staff Draft, Jan. 15, 1981)	11

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ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.
CITIZENS FOR A BETTER ENVIRONMENT, INC.
AMERICAN LUNG ASSOCIATION OF NORTHWESTERN OHIO, INC.
Respondents.

OPINION BELOW

The opinion of the court of appeals in *Natural Resources Defense Council, Inc., et al.*, v. *Gorsuch* is reported at 685 F.2d 718. It is reproduced in App. A to the petition of Chevron U.S.A. (No. 82-1005). The orders denying petitions for rehearing and suggestions for rehearing *en banc* are reprinted in App. B to the Chevron petition.

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* (Supp. IV, 1983) are reproduced in App. 1a-10a to the petition of American Iron and Steel Institute, *et al.* (No. 82-1247). Pertinent portions of the implementing regulations, 40 C.F.R. § 51.18(j), are reproduced in App. 32a-33a of the AISI petition.

STATEMENT OF THE CASE

The petitions for certiorari give no good reason for this Court to review the decision of the court of appeals. The lower court decision creates no conflicts among the circuits, with decisions of this Court, or even within the D.C. Circuit. The decision raises no constitutional question, no issue of general principles for statutory construction, and no generally applicable question of administrative law. The only issue presented in the petitions is the construction of one provision of a federal statute, the Clean Air Act as amended in 1977,[1] and on this issue the lower court reached the correct decision. Moreover, Congress is presently amending the Clean Air Act as a whole and shows every sign of explicitly endorsing the lower court decision. In these circumstances, Supreme Court review is unnecessary and unwarranted.

This case concerns the scope of one provision of the Clean Air Act. Specifically, the case concerns the statutory obligations of new and modified "major stationary sources" of pollution built in the heavily polluted areas of the United States that do not meet minimum federal health standards (the national ambient air quality standards).[2] Under Sections 110(a)(2)(D), 172(b)(6), and 173 of the Clean Air Act,[3] new and modified sources whose emissions exceed specified levels must undergo careful review and meet three pollution-reducing requirements in order to obtain a permit for construction and operation. This permit process is known as "new source review."

To obtain a permit, the owner or operator of the prospective source must: (1) use state-of-the-art pollution controls, (2) demonstrate compliance with all emission limits that apply to

[1] 42 U.S.C. §§ 7401 *et seq.* (Supp. IV.) All U.S. Code citations are to Supp. IV.

[2] The standards are established under Sections 108 and 109 of the Act, 42 U.S.C. §§ 7408-09.

[3] 42 U.S.C. §§ 7410(a)(2)(D), 7502(b)(6), 7503.

his existing sources, and (3) secure a substantial net reduction in overall emissions (usually through a greater-than-even emissions "offset").[4] These three conditions assure that new industrial growth reduces pollution rather than increases it, and contributes to, rather than hinders, rapid attainment of the health standards.

At issue in this case is the scope of the term "major stationary source": Which industrial projects are subject to new source review and the substantive pollution control requirements applied therein? All parties in this case agree that if a company wishes to build a major new industrial project—e.g., a large boiler, blast furnace, or petroleum storage tank—at a *new site* in an area with unhealthy air, that project is a "major stationary source" subject to new source review under Sections 110(a)(2)(D), 172(b)(6), and 173. The question in this case is whether the Clean Air Act treats this industrial project any differently if it happens to be built not at a new site, but within a *pre-existing plant.*

The statute mandates *identical* treatment for such projects, regardless whether they happen to be constructed at new sites or within existing plants. In areas with unhealthy air, both of these projects are "sources" subject to the Act's new source review requirements.

This is what the Environmental Protection Agency's regulations provided through October 1981.[5] At that time, however, former EPA Administrator Anne Gorsuch changed the definition of the term "source" so that it thenceforth applied only to entire industrial plants.[6] As redefined, the term no longer covered major individual units (such as boilers, blast furnaces, or storage tanks) located within plants. The stated purpose of this definitional change was to exempt the bulk of such units from new source review. Indeed, the exemption allowed more

[4] See pp. 12-14, *infra.*

[5] See 40 C.F.R. §§ 51.18(j)(1), 54.24(f), at 45 Fed. Reg. 52,743-44, 52,746 (Aug. 7, 1980).

[6] 46 Fed. Reg. 50,766, 50,771 (1981), amending 40 C.F.R. §§ 51.18(j)(1), 54.24(f). (AISI Pet. at 31a-33a.)

than *90 percent* of the projects Congress intended to be covered to evade the permit requirements.[7]

Under these rules, the builder of a major unit at a pre-existing plant could evade new source review and the pollution-reducing conditions for permits if he secured an intra-plant pollution reduction. Contrary to repeated misstatements by one of the petitioners,[8] the intra-plant emission reduction *did not have to be as large as the emission increase from the new unit.* Rather, the rules typically allowed plant-wide pollution *increases* of 25 to 40 tons per year, and in some instances as much as 100 tons per year, each time a major project was built.[9]

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[7] The reason is that areas with unhealthy air typically are already heavily developed, and nearly all major industrial growth takes place at existing plant sites. For example, between December 1977 and January 1982 there were 46 major additions or modifications to major existing plants in the San Francisco Bay Area, and only one new major source was constructed at a virgin site. Declaration of Jeff Gabe, Research Director, Citizens for a Better Environment (San Francisco), ¶ 11 (Jan. 1982) (documents filed with the court of appeals). Nationwide, EPA recorded more than 590 major additions or modifications to existing plants in nonattainment areas between 1976 and 1980. In the same period, EPA recorded no more than 14 major projects built in such areas at wholly new sites. EPA, "Emissions Offsets, Banking, and Trading Update" (Feb. 1980).

[8] Petitioners American Iron and Steel Institute, *et al.*, (AISI) repeatedly make the erroneous claim that the intra-plant emission reduction must be as large as the increase it is "netting out." AISI mischaracterizes the EPA plant-wide definition as follows: "If 'source' is so defined, the owner or operator . . . can make a process or equipment change which results in an increase in pollutant emissions at one unit within the plant without becoming subject to the permit process . . . if he counters that increase with an *equal or greater* contemporaneous decrease in emissions elsewhere in the plant." AISI Pet. at 5 (emphasis added). See also *Id.* at 7 and n. 17. This, as demonstrated in the following text and note, is simply not so.

[9] The rules deemed insignificant and treated as zero net plant-wide pollution increases up to the following amounts:

Carbon monoxide:	100 tons per year (tpy)
Nitrogen dioxide:	40 tpy
Sulfur dioxide:	40 tpy
Particulate matter:	25 tpy
Ozone:	40 tpy of volatile organic compounds (hydrocarbons)
Lead:	0.6 tpy

40 C.F.R. §§ 51.18(j)(1)(xiii), 52.24(f)(13).

(footnote continues)

On August 17, 1982, a panel of the lower court held EPA's plant-wide "source" definition contrary to law. (Chev. App. A.) The full court denied suggestions for rehearing *en banc* by a 6-1 vote. (Chev. App. B.)

REASONS FOR DENYING THE PETITIONS

None of the factors enumerated in Rule 17 as weighing in favor of granting petitions for certiorari is present in this case. As shown in Part I of this argument, the case has created no conflict among the circuits, with Supreme court decisions, or even within the D.C. Circuit. The case involves no constitutional questions. It raises no generally applicable issues of statutory construction or administrative law. The only issue involved is construction of a single provision of the Clean Air Act, an issue which—given the demands on the Court's limited resources—is not sufficiently important for review. Moreover, as demonstrated in Part II, on this issue the lower court reached the correct result.

I. THE LOWER COURT DECISION CREATES NO CONFLICT AMONG CASES, RAISES NO CONSTITUTIONAL ISSUES, AND PRESENTS NO GENERALLY APPLICABLE QUESTIONS OF STATUTORY CONSTRUCTION OR ADMINISTRATIVE LAW

A. No Conflict Among Cases

1. Among the Circuits

This case presents no conflict among the circuits. In fact, both the Fourth and Ninth Circuits have addressed the

(footnote continued)

Consider, for example, a new storage tank being built at a refinery, which would emit 200 tons per year of hydrocarbons. For hydrocarbons, the EPA rules treated any plant-wide increase up to 40 tons per year as though it were *zero*. To avoid new source review, the owner of the refinery would need to make an intra-plant reduction of just over 160 tons per year. Each time such a project was built, total hydrocarbon pollution in the air could increase by up to 40 tons per year.

"source" definition question and come to the same result as the District of Columbia Circuit.[10] Supreme Court review, therefore, is unnecessary.[11]

2. With Supreme Court Decisions

Petitioners EPA and AISI argue that the lower court decision conflicts with *Train* v. *Natural Resources Defense Council,* 421 U.S. 60 (1975). They contend that *Train* gives the states freedom to choose any path to attainment of the health standards that they wish, regardless of specific minimum requirements of the Clean Air Act. EPA Pet. at 13; AISI Pet. at 12. *Train,* however, does not go so far. That decision recognizes that in addition to demonstrating timely attainment of the health standards, the states' programs also must "satisf[y] the standards of § 110(a)(2)." 421 U.S. at 79.[12] The

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[10] Potomac Electric Power Co. v. EPA, 650 F.2d 509, 516-18 (4th Cir. 1981); Sierra Pacific Power Co. v. EPA, 647 F.2d 60, 66-67 (9th Cir. 1981). In both cases, petitioners sought unsuccessfully to block the application of new source performance standards (set under Section 111 of the Act, 42 U.S.C. § 7411) to new boilers being added to existing electric generating plants, by invoking a plant-wide "source" definition. Both courts rejected these claims. Although both courts found their decisions controlled by the D.C. Circuit's decision in ASARCO v. EPA, 578 F.2d 319 (D.C. Cir. 1978) (See note 14, *infra*), neither court expressed any reservations with the D.C. Circuit's reasoning.

[11] The petitioners complain that conflict among the circuits is impossible because the Clean Air Act assigns review of nationally applicable clean air regulations, such as those at issue in this case, exclusively to the District of Columbia Circuit Court of Appeals. Section 307(b)(1), 42 U.S.C. § 7607(b)(1). Congress did this, however, explicitly to serve the same goal served by Supreme Court review of conflicts among circuits: national uniformity of law. See S. Rep. No. 127, 91st Cong., 2d Sess. 41 (1970), reprinted in 1 *Legislative History of the Clean Air Act Amendments of 1970* at 441 (Senate Comm. on Public Works, Ser. 93-18, 1974):

> Because many of these administrative actions are national in scope and require even and consistent national application, the provision specifies that any review of such actions shall be in the United States Court of Appeals for the District of Columbia.

Petitioners assert they are deprived of opportunities for further litigation. Rather, the issue is now settled and framed for congressional review. As shown in Part III, Congress appears ready to endorse the lower court decision, not reject it.

[12] See also Union Electric Co. v. EPA, 427 U.S. 246, 250 (1976).

states' latitude to choose the "mix of emission limitations," *id.*, does not include authority to waive specific requirements of Section 110(a)(2).[13]

By virtue of subparagraph 110(a)(2)(D), as amended in 1977, the minimum requirements of Section 110(a)(2) include the new source review provisions of Sections 172(b)(6) and 173. As shown in Part II, these provisions rule out the plant-wide definition of "source." While the states retain control over many particulars of their SIPs under the 1977 nonattainment amendments, this is one requirement they may not waive. Because new source review is a requirement of Section 110(a)(2), there is no conflict with *Train*.

3. Within the D.C. Circuit

Petitioners Chevron and AISI strive to paint a picture of conflict within the decisions of the D.C. Circuit. Despite the petitioners' efforts to confuse, the decisions of the court of appeals are fully consistent with one another.[14] The petitioners

[13] A SIP could not be approved if it lacked emission limitations, for example. Thus, SIPs which substituted excessively tall smokestacks (to disperse pollution rather than control it) in place of actual emission limitations could not be approved. See Natural Resources Defense Council v. EPA, 489 F.2d 390, 408-10 (5th Cir. 1974), *rev'd in part on other grounds sub nom.* Train v. NRDC, 421 U.S. 60 (1975). See also Big Rivers Electric Corp. v. EPA, 523 F.2d 16 (6th Cir. 1975), *cert. denied*, 425 U.S. 934 (1975) (same); Kennecott Copper Corp. v. EPA, 526 F.2d 1149 (9th Cir. 1975), *cert. denied*, 425 U.S. 935 (1975) (same).

[14] In ASARCO v. EPA, 578 F.2d 319 (D.C. Cir. 1978), the court held that the plant-wide definition was inconsistent with the pollution-reducing purpose of the Act's program for establishing new source performance standards (NSPS), 42 U.S.C. § 7411, because the plant-wide definition would allow new facilities to escape such standards and maintain the high pollution rates of old facilities. The court observed: "Treating whole plants as single sources would grant the operators of existing plants permanent easements against federal new source standards—and the worst polluters would get the largest easements." *Id.* at 329 n.40.

In Alabama Power Co. v. Costle, 636 F.2d 323, 401-02 (D.C. Cir. 1979), the court found the plant-wide definition acceptable under the Act's program for protecting areas with air quality *better* than the minimum national health standards (prevention of significant deterioration or "PSD"). Sections 160-169A, 42 U.S.C. §§ 7460-91. The reason for the different result was that the

(footnote continues)

pressed identical arguments in petitions for rehearing *en banc*, which the court of appeals voted 6-1 against. Intra-circuit conflicts, if they exist at all, are generally left to the circuit to settle by sitting *en banc*.[15]

In sum, there is no conflict among the circuits, with Supreme Court opinions, or within the D.C. Circuit requiring this Court's resolution.

B. No Constitutional Issue

The petitioners have tried to create the impression that important issues of federal-state relations are at stake.[16] The petitioners do not even argue, however, that Congress is in any way constitutionally barred from defining the scope of the term "source." They contend only that Congress did not do so. That is purely a statutory question. The court of appeals decided that the statute does determine the meaning of "source," and as shown in Part II, that decision was correct.

C. No Generally Applicable Questions of Rules for Statutory Construction or Principles of Administrative Law

The petitioners contend the court of appeals failed to defer to EPA's construction of the statute. EPA Pet. at 12; AISI Pet. at 15. This contention raises no significant issue of general importance. Rather, it asks the Court merely to review one application of the well-settled law on when deference is appropriate.

(footnote continued)

purpose of the PSD program is different from the purpose of the NSPS program. PSD's purpose is not to reduce pollution, but to meter limited increases in pollution allowed by law. The court reached this conclusion relying on legislative history specific to the PSD program. *Id.* Because of the difference between program purposes, the court of appeals both distinguished and reaffirmed *ASARCO*. *Id.* at 402.

The distinction drawn in the prior cases clearly points to the illegality of the plant-wide "source" definition in the nonattainment program. NRDC v. Gorsuch, 685 F.2d 718, 725-727 (D.C. Cir. 1982) (Chev. App. A-13 through A-18).

[15] Wisniewski v. United States, 353 U.S. 901, 902 (1957).

[16] See *e.g.*, EPA Pet. at 14.

While deference to an agency's interpretation of the law is common, the courts "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *NLRB* v. *Brown*, 380 U.S. 278, 291 (1965). Deference to EPA's construction was not warranted in this case.

First, the law and legislative intent are definite on this issue. As shown in Part II, Congress explicitly intended new source review under Sections 110(a)(2)(D), 172(b)(6), and 173 to cover major industrial units built within existing plants, as well as such units built on their own. Second, the agency's interpretation was by no means long-standing or consistently held. The regulation in question dates only from 1981. For ten prior years, in the context of the program to meet the health standards where they are now violated, the term "source" covered the major units built within plants, not just whole plants.

Third, Congress has never given its blessing to EPA's 1981 plant-wide interpretation of the term "source." In fact, as elaborated in Part III, Congress is currently amending the Clean Air Act, and the key Senate Committee has explicitly endorsed the lower court decision.[17] Finally, no appeal to "agency expertise" can mask the obvious conflict between the pollution-reducing purposes of new source review in areas with unhealthy air and the pollution-*increasing* effect of EPA's plant-wide "source" definition.

Petitioner AISI also argues that the lower court applied an improper standard of review when it failed to defer to EPA's reversal of position on a factual assertion—a dubious claim that the congressionally-chosen pollution control requirements for new sources perversely harm air quality by retarding the replacement of old sources. AISI Pet. at 18. The issue of the standard for review of agency reversals, however, is not

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[17] See p. 23, *infra*. See also the legislative history of the 1981 Clean Air Act amendments, the Steel Industry Compliance Extension Act, discussed at note 48, *infra*.

presented in this case. The reason is that the government twice *explicitly conceded* its factual assertion in the court below.[18] Since EPA has conceded the factual issue on which AISI's deference argument depends, AISI's argument is moot.[19]

The only remaining basis for granting certiorari would be the presence of an important question of federal law warranting decision by this Court. As demonstrated in Part II of this argument, however, this case presents only a run-of-the-mill statutory question of the type usually left to the courts of appeals. The lower court decision, moreover, was correct on the merits, and has drawn congressional endorsement. Especially in the absence of any other consideration favoring certiorari, this question does not merit review.

II. THE LOWER COURT DECISION WAS CORRECT

The petitions for certiorari are based fundamentally on the false premise that the Clean Air Act does not define the meaning of the term "source" for the purposes of the program to meet the health standards. The Act, however, *does* determine the meaning of the term "source" and the scope of the permit provisions in the nonattainment areas. The 1977 amendments to the Act and their legislative history show plainly that major new and modified industrial units are subject to new source review, regardless whether located on their own or within plants. This result is compelled as well by the pollution-reducing purpose of new source review in the nonattainment areas. As a result, EPA has *no* discretion to give "source" a plant-wide definition, or to approve state regulations with plant-wide definitions. The lower court decision, therefore, was correct.

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[18] In its memorandum opposing a stay pending review (at 12) and in its brief on the merits (at 12), the Agency said: "EPA did not rely on this [the alleged effect on modernizations] as a basis for its decision." Rather, EPA sought to defend its decision on purely legal grounds.

The government's concession may have been motivated by the fact that the entire record support for this proposition consisted of two two-page, conclusory letters from industrial commentors. See pp. 65-68 of the Joint Appendix below.

[19] An agency's decision can be defended only on grounds the agency asserted. SEC v. Chenery Corp., 332 U.S. 194, 196 (1947).

A. The 1977 "Nonattainment" Amendments

The permit provisions of Sections 110(a)(2)(D), 172(b)(6), and 173 are part of the expanded program enacted in 1977 for meeting the national health standards (the primary national ambient air quality standards). Congress adopted this program in reaction to shortcomings of the Clean Air Act of 1970. Although significant progress was made under the 1970 Act, its requirements proved insufficient to protect public health. Nearly all the State Implementation Plans (SIPs)—the state pollution control programs required to be adopted under the 1970 Act[20]—projected that the health standards would be met by the original statutory deadline—mid-1975.[21] When the deadline passed, however, areas of the country containing more than two-thirds of the U.S. population still suffered air pollution in violation of one or more of the health standards.[22]

In 1977 Congress addressed the problems of these "nonattainment" areas with amendments to Section 110 and the addition of Sections 171-178.[23] Congress gave the states more time to meet the health standards, but also demanded greater efforts from them. The amendments extended the deadlines for attainment; the standards now must be met by the end of 1982 or (for some areas with special problems meeting standards for two of the pollutants) the end of 1987.[24] The amendments also called for each state to revise its SIP and incorporate into it a set of more specific and stringent measures

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[20] Pub. L. No. 91-604 § 110, 84 Stat. 1680. (Citations to provisions subsequently amended are given to Statutes at Large.)

[21] Section 110(a)(2)(A), 84 Stat. 1680. Under certain circumstances, a two-year extension could be granted. *Id.* § 110(e), 84 Stat. 1682.

[22] Report of the National Commission on Air Quality, pp. 3.3-20 through 3.3-33 (Preliminary Staff Draft, Jan. 15, 1981) (The Commission was established in 1977 under Section 323 of the Clean Air Act, 42 U.S.C. § 7623, to report on progress under the Act.)

[23] Pub. L. No. 95-95, §§ 108, 129, 91 Stat. 693-97, 745-50, codified at 42 U.S.C. §§ 7410, 7501-08.

[24] Section 172(a), 42 U.S.C. § 7502(a).

than those required by the 1970 Act.[25] Most important for this case, the SIP must contain an expanded permit program for new and modified "major stationary sources." Sections 110(a)(2)(D), 172(b)(6), 173, 42 U.S.C. §§ 7410(a)(2)(D), 7502(b)(6), 7503.

Under this permit program, the state may issue a permit for construction and operation only if the following conditions are met:

> (1) the permitting agency determines that—
>
> > (A) by the time the source is to commence operation, total allowable emissions from existing sources in the region, from new or modified sources which are not major emitting facilities, and from the proposed source will be sufficiently less than total emissions from existing sources allowed under the applicable implementation plan prior to the application for such permit to construct or modify so as to represent (when considered together with the plan provisions required under section 172) reasonable further progress (as defined in section 171); or
> >
> > (B) that emissions of such pollutant resulting from the proposed new or modified major stationary source will not cause or contribute to emissions levels which exceed the allowance permitted for such pollutant for such area from new or modified stationary sources under section 172(b);
>
> (2) the proposed source is required to comply with the lowest achievable emission rate; and

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[25] Where a promise to meet the health standards as late as the last day before the deadline was acceptable under the 1970 Clean Air Act, the SIP now must also demonstrate incremental improvement in the interim years ("reasonable further progress"), Section 172(b)(3). The new plan must incorporate upgraded pollution controls for existing sources ("reasonably available control technology"). *Id.*

> (3) the owner or operator of the proposed new or modified source has demonstrated that all major stationary sources owned or operated by such person (or by any entity controlling, controlled by, or under common control with such person) in such State are subject to emission limitations and are in compliance, or on a schedule for compliance, with all applicable emission limitations and standards under this Act....

Section 173(1)-(3). Paragraph (1)(A) requires the owner of the major source to secure an emissions "offset." The "offset" must exceed the emissions of the new source by an amount sufficient to constitute reasonable further progress towards attainment.[26] Paragraph (2) requires use of state-of-the-art emission control techniques.[27] Paragraph (3) requires that the source owner demonstrate that its existing facilities are subject to and in compliance (or on schedules for compliance) with pollution limits.

Paragraph (1)(B) allows a waiver of the "offset" requirement if the state, pursuant to Section 172(b)(5), has adopted a SIP containing sufficient extra emission reductions from existing sources, beyond those needed for marginal attainment and

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[26] "Reasonable further progress" is defined as annual incremental progress towards the standards in the years before the deadlines. Section 171(1), 42 U.S.C. §7501(1). This requirement is intended to keep states from deferring all pollution control measures until the last moment before the deadlines.

[27] The proposed source must meet the "lowest achievable emission rate" (LAER). Section 173(2), 42 U.S.C. §7503(2). LAER is defined as equal to the lowest pollution rate actually being achieved by an existing source of the same type, or as equal to the lowest rate required of such a source by any state, whichever is lower. Section 171(3), 42 U.S.C. §7501(3). The legislative history indicates that the states and EPA may consider the cost of controls when determining LAER, but in view of the health interests at stake, must give cost less weight than when setting other standards (e.g., the new source performance standards established under Section 111 of the Act, 42 U.S.C. §7411.) See H.R. Rep. No. 294, 95th Cong., 1st Sess. 215 (1977), reprinted in 4 *Legislative History of the Clean Air Act Amendments of 1977* at 2682 (Senate Committee on Environment and Public Works, Ser. No. 95-16, 1978) (hereinafter cited as *Leg. Hist.*).

reasonable further progress, to provide a "growth allowance." Under no circumstances, however, does Section 173 let a state waive the technology or self-enforcement requirements. These must be met by major new and modified sources even in a nonattainment area whose SIP has a growth allowance.

As an incentive for adopting and implementing the upgraded State Implementation Plans contemplated by the 1977 amendments, Section 110(a)(2)(I) provides that no major stationary source may be constructed or modified in the nonattainment areas of states which have not revised their plans in accordance with these provisions by mid-1979. 42 U.S.C. § 7410(a)(2)(I). Once the SIP is approved by EPA, permits may not be issued for construction of major sources unless the state is carrying out the plan. Section 173(a)(4), 42 U.S.C. § 7503(a)(4). In this way, Congress gave the states and private industry a common interest in taking the measures necessary to protect public health.

A "*major* stationary source" is "any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant." Section 302(j), 42 U.S.C. § 7602(j). A major modification is any physical or operational change in an existing source which causes its emissions to increase by "significant" amounts—typically 25-40 per year—specified by regulation.[28]

The term "stationary source" itself is defined as "any building, structure, facility, or installation which emits or may emit any air pollutant." Section 111(a)(3), 42 U.S.C. § 7411(a)(3).

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[28] "Modification" is defined as "any physical change, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by the source or results in emission of any air pollutant not previously emitted." Sections 111(a)(4), 171(4), 42 U.S.C. §§7411(a)(4), 7501(4). The "significant emission" levels were promulgated pursuant to Alabama Power Co. v. Costle, 636 F.2d 323, 399-400 (D.C. Cir. 1979). They are set out in note 9, *supra*.

The statutory text, the legislative history of the permit provisions, and the fundamental purpose of the provisions, definitively show that new source review in "nonattainment" areas applies equally to major industrial units being built within existing plants and major units being built on their own.

B. The Statutory Terms

The legislative intent is apparent in the statutory terms themselves, beginning with the statutory definition of "source." Section 111(a)(3) defines a "source" as "any building, structure, facility, or installation" which emits or may emit air pollution. A project which is any one of these four terms is a "source." These terms are not susceptible of a plant-wide construction. A "building" cannot be a combination of buildings. A "structure" cannot be a collection of structures. "Facility," as explained below,[29] was the term chosen by the 1976 and 1977 Senate bills, which unmistakeably intended new source review in nonattainment areas to cover the major projects within plants. "Installation," prior to the 1981 rules change, was defined by EPA itself as a major piece of process equipment.[30] EPA's subsequent attempt to define all four terms as only entire plants cannot be squared with the statutory language or intent, and was properly reversed by the court of appeals.

This conclusion is reinforced by Section 173. As explained above, Section 173(1)(B) allows a state to waive the greater-than-even "offset" requirement if it creates a growth allowance by requiring extra emission reductions from existing sources. Nothing, however, permits a state to waive the technology or self-enforcement requirements. There is no logical reason why Congress would have so sharply delineated the terms for waiving "offsets," and would have so clearly barred waiver of the other two requirements, if Congress had intended to let EPA eliminate *all three* conditions by changing the definition of a "source." The procedure for waiver of offsets makes sense

[29] See pp. 17-18, *infra*.

[30] See note 5, *supra*.

only if Congress understood "source" to include the major projects built within plants.[31]

C. Analysis of the Legislative History

The same conclusion follows from the legislative history. The permit provisions have their origin in 1976 legislation to amend the Clean Air Act. This bill proceeded as far as Conference Committee agreement, but failed to become law because of a post-conference filibuster on an unrelated issue. To tide over until Congress could complete action the following year, in December 1976 EPA adopted an interpretive ruling based on these provisions. In 1977, amalgamating the 1976 bill and the EPA ruling, Congress enacted Section 173. From

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[31] The limited opportunity to waive offsets, but not the technology or self-enforcement conditions, explains the real meaning of the petitioners' principal legislative history citation. The House Report states that the 1977 nonattainment provisions have two main purposes:

> (1) to allow reasonable economic growth to continue in an area while making reasonable further progress to assure attainment of the standards by a fixed date; and (2) to allow states greater flexibility for the former purpose that EPA's present interpretative regulations afford.

H.R. Rep. 294, 95th Cong., 1st Sess. 211, 4 *Leg. Hist.* at 2678. From this passage the petitioners infer that EPA has the freedom to adopt a plant-wide definition of "source." (EPA Pet. at 15; AISI Pet. at 13-14; Chev. Pet. at 12.)

Their broad inference is incorrect, however. The pages of the Report which follow (211-14, 4 *Leg. Hist.* at 2678-81) plainly show that Congress had two specifics in mind when referring to "greater flexibility." First, Congress adopted the growth allowance alternative to offsets in Section 173(1)(B), an option which was not available under the EPA "offset ruling" referred to in the quotation. See p. 21, *infra*. Second, Congress altered the baseline for calculating emissions offsets under the interpretive ruling. Under EPA's ruling, a source owner or operator could take credit for an emission reduction, as an offset against new pollution, only to the extent pollution was reduced below "reasonably available control technology" levels. In these amendments, Congress changed the offset baseline for the period until revised nonattainment SIPs were adopted. Until then, the offset baseline was the emission level allowed by the SIP presently in effect. Section 129(a), codified as a note to 42 U.S.C. §7502. This had the effect of allowing more "room" for growth during the transition period while SIPs were being revised.

The cited passage can hardly be read as a general grant of discretion. It does not extend to changing the basic "source" definition.

beginning to end, the permit provisions applied to major new and modified units built within plants, and a plant-wide "source" definition was ruled out.

1. The 1976 Bill

The new source review and permit provisions were first introduced in the 1976 Senate bill. The 1976 Senate Report stated the problem which the bill sought to solve. Under the 1970 Act, in areas where the deadlines for meeting the health standards had passed unmet, *no further additions to polluting industries were allowed:*

> The Clean Air Act prohibits the addition of any emissions of an air pollutant in any air quality control region or portion thereof where an ambient air quality standard for that pollutant has not been attained.[32]

The Report noted, however, that the nonattainment areas include many places where economic growth and industrial development are highly desirable. "The most logical and economical place for industrial expansion to take place," the Report continued, "is often at existing plant sites, in the vicinity of present industrial development."[33]

To allow such growth to proceed, the Senate Committee adopted an exception from the general growth prohibition of the 1970 law, allowing the addition of new "facilities" at existing plant sites. The exception was narrow. It did not allow construction of new facilities at *new* sites in nonattainment areas under any circumstances. It did not even allow the addition of a new facility to an existing plant unless the new facility met pollution-reducing conditions (conditions which later grew into the state-of-the-art technology, self-enforcement, and greater-than-even offset requirements of the present Section 173).

Specifically, the Committee adopted Section 11 of S. 3219, which stated:

> No major emitting facility shall be constructed or modified in any air quality control region or

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[32] S. Rep. No. 717, 94th Cong., 2d Sess. 42 (1976), 6 *Leg. Hist.*, at 4743.
[33] *Id.*

> portion thereof in which any national ambient air quality standard is exceeded, if such facility will emit air pollutants subject to such standard so as to prevent the attainment or maintenance of such standard, except that *a facility proposed for construction or modification at an existing site or plant* owned or operated by the owner or operator of such facility may be constructed or modified *if* the owner or operator demonstrates to the satisfaction of the state that (A) the proposed facility will comply with the best available technology ... applicable to such proposed facility before the proposed facility begins operation, (B) all existing sources owned or controlled by the owner or operator of the proposed facility are in compliance with an approved schedule and timetable for compliance ... (C) the total cumulative emissions from the facility location and the proposed facilities will at no time increase, [and] (D) the total allowable emissions from all existing and proposed sources at the proposed facility location will be sufficiently less than the total allowable emissions from the existing sources ... so as to represent reasonable further progress toward attainment of the applicable national ambient air quality standard ....[34]

Contrary to EPA's plant-wide "source" definition, this bill distinguished between "sources" and "plants" and permitted the addition of major new projects at existing plants *only* if the three technology, self-enforcement, and offset conditions were met.

The Senate provision was adopted unchanged by the Conference Committee.[35] Final enactment in 1976, however, was prevented by a filibuster on an unrelated issue (protection of areas with air quality better than the health standards).

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[34] Subparagraph (A) later became the "lowest achievable emission rate" requirement; subparagraph (B) became the compliance requirement; and subparagraphs (C) and (D) became the "offset" requirement. 6 *Leg. Hist.* at 4652-53 (emphasis added).

[35] S. 3219, §119, 5 *Leg. Hist.* at 4312.

2. The 1976 EPA Interpretive Ruling

Congress' failure to pass amendments in 1976 left EPA and the states in difficulty, because the statutory deadline for meeting the health standards had passed unmet in many places. As the 1976 Senate Report had observed, this meant no further new source construction was permitted in such areas. To avoid this result, after Congress adjourned EPA issued an interpretive ruling which permitted construction to continue in nonattainment areas on terms consistent with the 1976 bill's exception from the growth ban.[36] The "Offset Ruling" (as it has come to be known) permitted construction of a "major"[37] new and modified source in a nonattainment area only if the three conditions of the 1976 legislation were met: (1) compliance with the "lowest achievable emission rate," (2) certification that commonly owned or operated sources are in compliance (or on schedules for compliance) with applicable emission limits, and (3) achievement of a greater than one-for-one emissions "offset."[38] Under the Offset Ruling, just as under the 1976 bill, "sources" were individual major units, not whole plants.[39]

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[36] 41 Fed. Reg. 55,524 (Dec. 21, 1976).

[37] Defined as emissions of 100 tons per year of any pollutant, except carbon monoxide for which the threshold was 1000 tons. *Id.* at 55,528, col. 1.

[38] *Id.* at 55,528-29.

[39] This is evident from the preamble to the ruling, which notes that both "internal" and "external" emission reductions may be used to satisfy the offset condition. *Id.* at 55,526, cols. 2-3. (An "internal" offset is one from another source in the same plant; an "external" offset is one from another source at another site.) There would have been no need for discussion of internal offsets—indeed there would have been no such thing as an internal offset—unless what EPA meant by "source" was major industrial units (such as boilers and blast furnaces) rather than whole plants.

In addition, immediately after defining the amount of emissions which make a source "major," the text of the ruling states that:

> A proposed new source with an allowable emission rate exceeding the ["major"] amounts is considered a major source under this ruling, even though such a source may replace an existing source with the result that the net additional emissions are less than the ["major"] amounts.

Id. at 55,528, col. 1. This statement is not consistent with a plant-wide conception of "source," for whole plants are almost never replaced. Rather, replacements nearly always involve discrete units within plants.

3. The 1977 Amendments

In January 1977, Senator Muskie, the chief architect of the Clean Air Act, introduced S. 252, the new source review provisions which were identical to those of the Conference Committee bill of the year before.[40] The Senate Committee did not make any change in its decision of the year before that major new units added to existing plants in nonattainment areas could be built only if they met the above-described conditions. The Committee did address the question: "Should the exception be available only for expansion at existing sites, or also for construction of new facilities at new sites?"[41]

The bill adopted by the Senate Committee extended the exception to new facilities at new sites, not just to new facilities at existing sites. To accomplish this, the Committee used the term "major emitting facility" alone, dropping the limiting reference in the prior bill to "a facility proposed for construction or modification at an existing site or plant."[42] The Committee also began the transformation of conditions (A) through (D) of the 1976 bill to their present form in Section 173.

Introducing the bill on the Senate floor, Muskie made clear the limited nature of this change and the meaning of the term "major emitting facility." He said:

> This year the issue that drew the greatest attention during the working sessions of the committee was the issue of new emissions in areas exceeding standards. The provision contained in the bill reported by the committee last year dealt only with the the expansion of existing facilities in such areas.
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> The committee this year determined that a broadening of that provision was necessary so that new sources, without any existing facilities in the area, could still enter the area and construct new

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[40] 5 *Leg. Hist.* at 3605-06.

[41] A Section-by-Section Analysis of S. 252 and S. 253 Clean Air Act Amendments, 5 *Leg. Hist.* at 3873.

[42] S. 252, §13 (as reported by the Committee), 3 *Leg. Hist.* at 632.

> facilities under carefully limited procedures and meeting stringent requirements. The committee adopted a provision which provides protection for air quality while at the same time allowing new sources to be constructed.[43]

The Committee provision was adopted by the full Senate.

The House of Representatives began by adopting the EPA Offset Ruling into law.[44] The House bill modified the EPA ruling in only one significant respect, by providing the means for a state to waive the "offset" requirement if it adopted a SIP with a growth allowance.[45] The bill made no change in the Offset Ruling's definition of "source."

The Conference Committee melded the two bills into the current statutory language.[46] At no point in the legislative process was any change even suggested in the determination that the projects subject to new source review and permitting include the major units added within existing plants.

EPA's 1981 plant-wide "source" definition directly contradicted this congressional decision. It exempted major units at existing plants from the three Section 173 conditions upon compliance with a single, much less restrictive condition: a *less-than-even* intra-plant offset which allowed total pollution to increase.

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[43] 3 *Leg. Hist.* at 711.

[44] H.R. 6161, §117 (adding §127(b)(2)), 4 *Leg. Hist.* at 2331-32. Citations are to the bill passed by the Committee. The permit provisions were adopted without change by the full House. 4 *Leg. Hist.* at 3216.

[45] *Id.*, §127(c)(5)(A), (d)(1), 4 *Leg. Hist.* at 2333, 2336-37. See p. 16, *supra*.

[46] The similarity of the House and Senate provisions was emphasized by Rep. Paul Rogers, chairman of the House subcommittee responsible for the bill, when introducing the Conference agreement to the full House. Under the subject heading "Nonattainment" Rogers began: "The House and Senate bills were very close on this issue to begin with." The ensuing description of points of difference and compromise did not mention the scope of new source review, because there were no differences there. 3 *Leg. Hist.* at 319.

The 1977 amendments also adopted the EPA "offset ruling" described above (p. 19, *supra*) for an interim period. Pub.L. 95-95, §129(a), codified as a note to 42 U.S.C. §7502.

D. Analysis of the Statutory Purpose

The statutory provisions and legislative history just surveyed make plain Congress' purpose in adopting the new source review provisions. Congress intended that the construction or modification of major sources in nonattainment areas should contribute to, rather than hinder, rapidly meeting the health standards. Growth in such areas was acceptable only under the three pollution-reducing conditions of Section 173. Congress expressly found it unacceptable for such growth to continue while making pollution worse.[47]

Relying on the evident purpose of these provisions, and observing the effects of the plant-wide "source" definition, the court of appeals found that definition contrary to law. The court stated:

> The nonattainment program's *raison d'être* is to ameliorate the air's quality in nonattainment areas sufficiently to achieve expeditious compliance with the NAAQSs [national ambient air quality standards].

685 F.2d 718, 726-27 (Chev. App. A-19) (footnote omitted). Because of this purpose, changing the definition of "source" in order "to shrink to relatively small size new source review in

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[47] Contesting the lower court's analysis of the statutory purpose, the government's petition for certiorari claims the nonattainment program's new source review requirement "is not a mandate for the maximum feasible reduction in emissions." EPA Pet. at 20. To the contrary, the 1977 House Report stated:

> [I]n light of the adverse air quality and health consequences of this new pollution [from new sources allowed despite continued health standard violations], the committee concluded that all feasible efforts to reduce or control this new pollution should be mandated.
>
> Futhermore, maximum pollution control from new sources is necessary in order to permit room for maximum potential economic growth .... Finally, the technology-forcing purpose of the act is best served by requiring maximum feasible pollution control from these new sources in dirty air areas.

H.R. Rep. No. 294, 95th Cong., 1st Sess. 215, 4 *Leg. Hist.* at 2682.

nonattainment areas[] is impermissible." *Id.* at 720 (Chev. App. A-4) (footnote omitted).

This basis of decision was itself correct. Moreover, it necessarily leads to the same conclusion as direct analysis of the statute and its legislative history. EPA has no discretion to adopt a plant-wide "source" definition, or to approve State Implementation Plans with such a definition. For these reasons, the lower court decision was correct.[48]

III. CONGRESS SHOWS EVERY SIGN OF ENDORSING THE LOWER COURT DECISION

An additional reason why Supreme Court review is unwarranted is that Congress is currently considering legislation to amend the Clean Air Act and can give a timely hearing to the

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[48] Congress reiterated the meaning its holds for the term "source" in 1981, with the passage of an amendment to the Clean Air Act extending certain compliance dates for the steel industry. The Steel Industry Compliance Extension Act, Pub. L. No. 97-23, 95 Stat. 139 (1981), allows steel companies more time for compliance with emission limits applicable to their existing facilities, provided the companies meet carefully drawn conditions relating to modernizing these facilities and protecting air quality in the interim. The House Report on the bill emphasized that in "nonattainment" areas:

> [T]he program to modernize facilities will also continue to include the application of lowest achievable emission rate technology (LAER) on the modernized facilities.

H.R. Rep. No.121, 97th Cong., 1st Sess. 12 (1981), reprinted in [1981] U.S. Code Cong. & Admin. News 63. The Report then listed examples of the type of projects that would be subject to LAER and the other new source permitting requirements:

> It is anticipated that the industry will use the opportunity to modernize the American steel industry by building modern *continuous casters*, converting *open hearth shops* to *basic oxygen furnaces* or undertaking similar projects to improve the competitive posture of the industry.

Id. (emphasis added). Each of the types of projects mentioned is a unit within a plant, not a plant itself. Modernization of such an installation is the construction or modification of a "major stationary source" and is subject to the permit provisions. *Twice* in the proceedings below, EPA admitted that these passages "do indicate that Congress thought new source review would apply to facilities within a plant." EPA Memorandum in Opposition to a Stay at 16; EPA brief at 19.

petitioners' objections to the scope of new source review. The question in this case is purely a matter of what Congress deems proper. EPA, in fact, has asked Congress for an amendment to adopt the plant-wide "source" definition.[49]

Congress, however, shows every sign of rejecting the EPA request. In May 1982, before the lower court decision, the Senate Committee on Environment and Public Works adopted an amendment which reversed the EPA plant-wide "source" definition.[50] The Senate Report, written after the lower court decision, explicitly endorses it: "The court's decision . . . correctly interprets congressional intent. . . ."[51]

The identical bill, containing the same "source" amendment, has been reintroduced in this session by the Chairman of the Senate Committee, Senator Stafford.[52] Congress probably will complete action on Clean Air Act amendments before the Court could decide this case. This schedule, coupled with the fact that Congress appears well satisfied with the lower court decision, makes Supreme Court review unnecessary.

IV. FURTHER REVIEW WOULD UNNECESSARILY DELAY PUBLIC PROTECTION FROM RECOGNIZED HEALTH HAZARDS

The Clean Air Act, as noted above, sets an urgent schedule for meeting the health standards, the primary national ambient air quality standards. Most areas were to have met these standards by December 31, 1982, deadline. Although many areas succeeded, more than 100 areas of the country appear not

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[49] Statement of EPA Assistant Administrator Kathleen M. Bennett, quoted in the *New York Times*, Aug. 18, 1982, p. 1.

[50] The amendment adds a new paragraph to Section 171 defining a "major stationary source" to include "each discrete operation, unit, or other activity which produces or may produce emissions of one hundred tons or more per year" of a pollutant for which the area does not meet the health standard. S. 3041, § 114 (adding § 171(5)), reprinted in S. Rep. No. 666, 97th Cong., 2d Sess. 157 (1982).

[51] *Id.* at 49.

[52] S. 768, 129 Cong. Rec. S2583 (daily ed. Mar. 10, 1983). Of course, if the lower court decision is allowed to stand, the "source" amendment will not be necessary.

to have met the deadline.[53] For these areas, far from being able to relax, EPA and the states are now under special obligations to take action to protect public health.[54]

EPA's change of the "source" definition to let most major new and modified projects escape new source review was completely inconsistent with these obligations. In response to the redefinition, 31 states (or parts of states) have already adopted, or are in the process of adopting, the plant-wide definition. Many of the areas which failed to meet the standards by the 1982 deadline are in these states. These areas must be made to adopt the correct "source" definition, so that industrial growth in these areas will play its congressionally designated part in protecting public health from dangerous air pollution.[55]

Because of the petitions for certiorari, issuance of the lower court's mandate has been stayed. EPA has taken the position that until the mandate is issued, it will not take any step to correct its own regulations or the State Implementation Plans

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[53] Even those areas which have extensions for meeting the carbon monoxide and ozone standards until the end of 1987 have their work cut out for them. A substantial number of such areas will fail to meet the standards by the 1987 deadline unless they promptly adopt the proper "source" definition.

[54] When the Administrator determines that a State Implementation Plan "is substantially inadequate to achieve [any] national ambient air quality primary or secondary standard," he must notify the state. The state then must revise the plan to cure the inadequacy. Section 110(a)(2)(H)(ii), 42 U.S.C. § 7410(a)(2)(H)(ii). If the state does not do so within 60 days, EPA must promulgate, and if necessary implement, an adequate SIP. Section 110(c)(1)(C), 42 U.S.C. § 7410(c)(1)(C). The failure to meet the standards by the 1982 deadline triggered these obligations of the states and EPA.

[55] Instead of carrying out the process described in the preceding note, former EPA Administrator Gorsuch threatened these areas with a moratorium on the issuance of permits for major new and modified sources. See 48 Fed. Reg. 4972 (Feb. 3, 1983). This threat is based on a misconstruction of Sections 110(a)(2)(I) and 173(4), 42 U.S.C. §§ 7410(a)(2)(I), 7503(4).

These provisions prevent issuance of permits to major new or modified sources of pollutants for which an area has unhealthy air if the area (a) does not have or (b) is not carrying out an EPA-approved SIP. See p. 14, *supra*.

(footnote continues)

with plant-wide "source" definitions.[56] Review by this Court would probably take another year. In this period, dozens of major sources will be built or modified without securing the permit required by Section 173. The Court's review would lead it to the same result as the lower court. In these circumstances, review is unwarranted.

V. THE LOWER COURT DECISION CORRECTS AN ABUSE OF THE "BUBBLE" CONCEPT

One final matter requires discussion. Running throughout the Chevron petition is an implication that the lower court decision bars any use of the "bubble" concept under the Clean Air Act. This implication is wrong. The case below did no more than reverse *one misapplication* of the "bubble" concept which, as we have shown, permitted air pollution sources to avoid the emission control responsibilities Congress has assigned them.

Discussion of the "bubble" concept is often muddied by a misconception that the "bubble" is only one thing. In fact, there are many different applications of the concept. Some

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(footnote continued)

The moratorium does *not* apply, however, in areas which *have* approved SIPs, and which have been carrying them out in good faith. *See* Statement of Sen. Stafford, Chairman of the Environment and Public Works Committee (and attached letter and memorandum of law from Sens. Stafford and Randolph to the EPA Administrator), 128 Cong. Rec. S15250-53 (daily ed. Dec. 16, 1982). *See also* Congressional Research Service, "The Application of Nonattainment Area Sanctions Under the Clean Air Act" (Feb. 17, 1983).

The proposed application of the moratorium is of very doubtful legality. Even if it is promulgated by the new EPA Administrator, it will not likely be sustained by the courts of appeals. This Court does not review one action just because of the speculated consequences of a possible future action that may not even be taken, and that will be subject to judicial review if it is.

[56] This policy is set forth in a memorandum entitled "D.C. Circuit Ruling on *Natural Resources Defense Council* v. *Gorsuch*, No. 81-2208—Reinstatement of the 'dual definition' of 'source' for new and modified sources in nonattainment areas," from Robert Perry (Associate Administrator and General Counsel) and Kathleen Bennett (Assistant Administrator for Air, Noise, and Radiation), to Regional Administrators, *et al.* (Aug. 27, 1982), Appended to Respondent's Motion to Stay Issuance of the Mandate (Nov. 2, 1982) (on file with the court of appeals).

applications are consistent with the Clean Air Act's requirements and purposes. Others, however, undermine those requirements and purposes.

The "offset" requirement of Section 173(1)(A) falls in the former category. It is specifically authorized by law. It is a fundamental part of the program for achieving the Act's primary goal: healthful air quality. The "offset" requirement assures that each time a major new source is built, existing pollution is reduced by more than the new source adds.

The plant-wide "source" definition, by contrast, operates to exempt new sources from the "offset" requirement and the other statutory conditions on permits. It actually lets total plant-wide pollution *increase* each time such a project is built, because the intra-plant reduction in emissions does not have to be as great as the emissions increase from the new project. This use of the "bubble" concept contravenes both the letter and spirit of the Clean Air Act.

The lower court ruled the plant-wide "bubble" illegal for the nonattainment program. The court did not rule on any other application of the "bubble" concept.[57] Other types of "bubbles" will have to be evaluated individually, on their own merits. Some types undoubtedly will pass muster; others will not. These, however, are cases for the future.

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[57] The ARMCO "bubble" discussed by *Amicus* Mid-America Legal Foundation is another type of "bubble" which simply was not at issue in this case and is not affected in any way by the lower court's decision. The ARMCO "bubble" has no bearing on the plant-wide "bubble" involved in this case.

CONCLUSION

For the foregoing reasons, the petitions for certiorari should be denied.

Respectfully submitted,

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